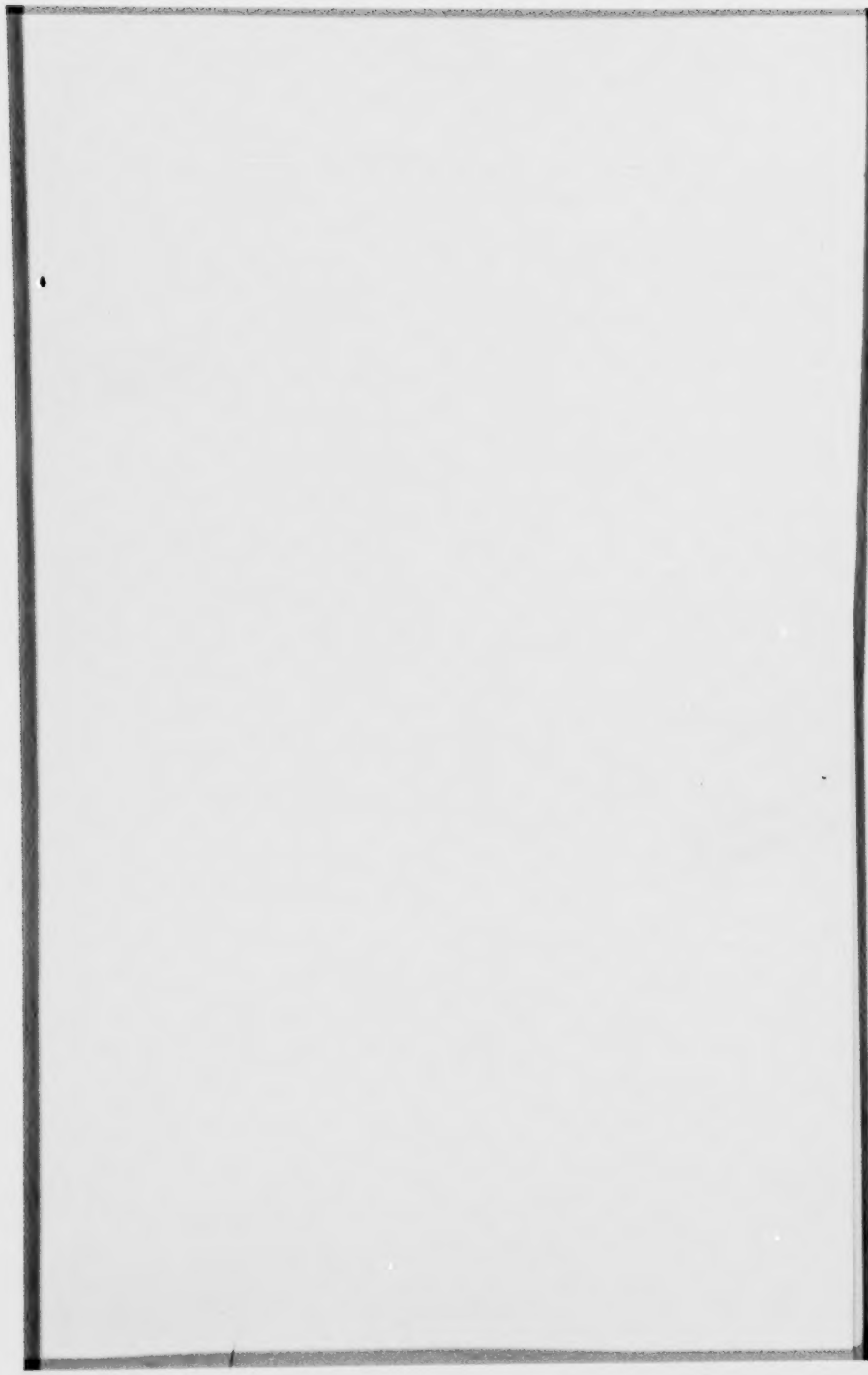

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Point I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO THE INTERPRETATION OF THE EXEMPTION CONTAINED IN SECTION 13 (a) (3) OF THE FAIR LABOR STANDARDS ACT OF 1938 INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Prior to the enactment of the Fair Labor Standards Act of 1938, little doubt appeared to remain regarding the status of employees on board dredges. These employees had been held to be "seamen" as well as "members of a crew" in every adjudicated decision then existing. They had been so held regardless of the statute or of the situation involved.

Thus, in *The Atlantic*, 53 Fed. 607, (D. S. C.), an engineer on a dredge was held to be a seaman and therefore entitled to a seaman's lien. In *McRae vs. Bowers Dredging Co.*, 86 Fed. 344, at 348 (D. Wash.) pipemen and certain other employees on dredges were held to be seamen and entitled to liens. In *Saylor vs. Taylor*, 77 Fed. 476 (C. C. A. 4) an engineer, deckhands, scowmen and cooks on dredges were held to be seamen entitled to liens. In *The Hurricane*, 2 Fed. (2d) 70, (E. D., Penn.), a dipper tender was similarly held to be a seaman. In *Kibadeaux vs. Standard Dredging Co.*, 81 Fed. (2d) 670 (C. C. A. 5), (Cert. den. 299 U. S. 549), a deckhand on a dredge was held entitled to maintain a lien in admiralty for injuries received through the unseaworthiness of the vessel and was said to be a seaman and member of the crew within the meaning of the Merchant Marine Act and Longshoremen's Compensation Act.

In *Ellis vs. United States,* 206 U. S. 246, a master, deckhand, cranesman, and fireman on a dredge were held not to be laborers or mechanics but seamen within the meaning of the Eight Hour Day Act. In *Maryland Casualty Co. vs. Lawson,* 94 Fed. (2d) 190, (C. C. A. 5), a deckhand on a scow was held to be a seaman and member of a crew within the meaning of the Longshoremen's Compensation Act. In *Pariser vs. City of New York,* 146 Fed. (2d) 431, (C. C. A. 2), a deckhand on a dredge was held to be a seaman within the meaning of the Jones Act. In *City of Los Angeles vs. United Dredging Co.,* 14 Fed. (2d) 364 (C. C. A. 9), an engineer on a dredge was said to be a seaman and neither the dredge nor the engineer subject to local inspection or licensing ordinances. In *Butler vs. Ellis,* 45 Fed. (2d) 951, (C. C. A. 4) dredge employees were held to be entitled to maritime liens where the company was in bankruptcy.

In *The Carson,* 104 Fed. (2d) 762 (C. C. A. 9), (*cert. den. sub. nom. Union Dredging Co. vs. Brashear, Admx.,* 308 U. S. 591), the owner of a dredge was held liable to the value of the dredge and "her pending freight" for the death of an insane fireman who jumped overboard. The Court stated that the captain had failed to fulfill the obligation of care in not providing for the fireman's safe confinement to the dredge and his being taken by launch to a hospital.

With the exception of one or two cases, all of these decisions were in existence prior to the enactment of the Fair Labor Standards Act. They represent the background of judicial precedent in existence when Congress selected the term "seaman."

From the time of enactment of the Fair Labor Standards Act in 1938 down to November 16, 1942, no issue on this point had ever been seriously raised by the Wage and Hour

Division of the Department of Labor. It is true that an earlier Interpretative Bulletin, issued by the Administrator of the Wage and Hour Division, had suggested that employees "engaged in dredging operations" would be classed with stevedores, longshoremen or employees constructing docks, levees or other structures, and regarded as "seamen."[1]

Yet in *Wage and Hour Release No. R-899,* issued July 12, 1940, the Administrator ruled that employees of the Smoot Sand & Gravel Corporation operating dredges were seamen and, therefore, exempt. It was almost a year later before *Wage and Hour Release No. R-1467,* issued June 21, 1941, held this prior conclusion to be erroneous.

Moreover, Interpretative Bulletin No. 1 had made it clear that the Administrator had no general powers to issue rulings, including or excluding industries within the coverage of the act, and that, accordingly, interpretations announced by the Administrator served

> "to indicate merely construction of the law which will guide the Administrator . . . unless and until he is directed otherwise by authoritative ruling of the court".

The unbroken line of judicial precedent, coupled with the Administrator's own apparent uncertainty with respect to the issue, caused the dredging industry to rely on the well settled principle that their employees were seamen and were, therefore, not to be regarded as within the coverage of the Fair Labor Standards Act.

In December of 1940 the case of *Gale v. Union Bag & Paper Corporation,* 116 Fed. (2d), 27, (C. C. A. 5) was de-

[1] Interpretative Bulletin No. 11, issued July, 1939.

cided. Barge tenders were there held to be seamen. This holding was contrary to the Administrator's original interpretation in Interpretative Bulletin No. 11 and was reached despite the fact that the employees involved had much less of a permanent attachment to the vessel than the dredge workers here involved. Certiorari was denied by this Court in 313 U. S. 559.

Following upon this decision, it was held in *Bolan v. Bay State Dredging & Contracting Co.*, 48 Fed. Sup. 266, (D. Mass.) decided on December 31, 1942, that a deckhand on one of the dredges of this Petitioner was a seaman within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act of 1938. No appeal was taken in the *Bolan* case.

In December of 1943, the District Court for the District of Massachusetts held in the present case that each of the dredge employees of the Petitioner was a "seaman" within the meaning of the exemption. Thus, it was not until April, 1945, that a contrary result was reached for the first time.

On April 23, 1945, the Circuit Court of Appeals for the Second Circuit in the case of *Anderson v. Manhattan Lighterage Corporation,* 148 F. (2d) 971 (C. C. A. 2), reversed judgments of the District Court and held that bargees, or so-called lighter captains, were not seamen within the meaning of the Fair Labor Standards Act.

This was followed by the decision in the case of *Walling, Adm. v. Great Lakes Dredge & Dock Co.,* 149 F. (2d) 9 (C. C. A. 7), decided April 24, 1945. In that case, (Petition for re-hearing denied June 9, 1945), dredge employees were held not to be seamen and, therefore, within the coverage of the Fair Labor Standards Act of 1938.

On May 9, 1945, the decision in the instant case was handed down by the Circuit Court of Appeals for the First Circuit.

Petition for re-hearing was denied on July 30, 1945.

These decisions have the effect of imposing upon a substantial branch of the marine industry very heavy financial penalties. These penalties would result because that industry had followed judicial precedent which for years had built up the benefits and remedies of dredge employees on the theory that they were seamen. An industry, wherein a special status on the part of employees is thus enjoyed, now finds itself subjected to serious penalties precisely because it believed the principle of law to be definitely settled. The fact that this belief was, for a time at least, shared by the Department of Labor is evidenced by their failure, throughout the country, to take any steps toward litigating the matter for over four years after the enactment of the law.

A Petition for Writ of Certiorari has been filed in the case of *Anderson vs. Manhattan Lighterage Corporation.*[*2] It is understood that a similar Petition is being filed in the case of *Walling, Adm. vs. Great Lakes Dredge & Dock Co.*

A case entitled *Walling, Adm. vs. W. D. Haden Company* is now pending in the United States Circuit Court of Appeals for the Fifth Circuit as case No. 11302 on the dockets of that Court. That case is an appeal by the Administrator of the Wage and Hour Division from a judgment of the District Court of the United States for the Southern District of Texas, Galveston District (unreported), decided on

[*2] Docket No. 121.

October 28, 1944. The Haden Company is engaged in digging and transporting shell from shell reefs, using in the process dredge boats, barges, tugs, etc. The District Court held, upon the authority of *Gale vs. Union Bag & Paper Corporation*, 116 Fed. (2d) 27, (C. C. A. 5), (Cert. den. 313 U. S. 559), and *Bolan vs. Bay State Dredging & Contracting Co.*, 48 Fed. Sup. 266, that the dredge boat employees were seamen.

It is understood by counsel that there is at least one other case now pending in a District Court, raising the identical issue involved in the present case.[2a]

All of these cases involve the question of construction of the exemption contained in Section 13 (a) (3) of the Fair Labor Standards Act of 1938. That exemption has never been considered by this Court except by way of denial of certiorari in the case of *Gale vs. Union Bag & Paper Corporation*, 116 Fed. (2d) 27, (C. C. A 5), (Cert. den. 313 U. S. 559).

In view of the importance of this exemption to the marine industry, the numerous cases pending which involve its interpretation, and the confusion wrought by the disregard of what appeared to be well established principle, it is respectfully submitted that the question of federal law involved should be settled by this Court.

A.

Petitioner's Employees on Board Dredges are Seamen and Have Always Been Included Within the Meaning of that Term.

In its decision in the present case, the Circuit Court of Appeals has stated that the word "seaman"

[2a] *Walling v. Sternberg Dredging Co.*, now pending in the U. S. District Court for the Eastern District of Missouri as Civil Action No. 3002.

"has no established meaning to include dredge workers . . ." (R. p. 34).

No decision is cited by the Court in justification of this statement and it is difficult to see how it can be supported in the face of the decisions cited above. Not a single case existed prior to 1938 holding dredge workers to be non-seamen. If this unbroken line of judicial precedent does not suffice to give an established meaning to the word "seaman" as including dredge workers it is hard to understand what would achieve that result.

It is true that this Court stated in *Warner vs. Goltra*, 293 U. S. 155, at 158:

> "What concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained".

But in that case, the question presented was whether the master of a vessel was within the definition of "seaman" under the Merchant Marine Act of 1920. A number of cases had been cited by the Court indicating that under some statutes a master was treated as a seaman, while under others he was not. Obviously, in those circumstances, a reference to earlier cases arising under other statutes would be of little help in the process of construing the statute then before the Court. There were cases holding both ways on the issue as to whether or not a master was a seaman and the cases varied with the particular statute under which they arose.

In contrast, the very point in the present case is that the judicial classification of dredge employees as seamen has

been uniform and unvarying from the very beginning. In 1938, a line of judicial precedent had included dredge workers within the term "seaman" under every circumstance that had yet arisen. It is difficult to understand how anyone could have concluded in 1938 that the mere use of the word "seaman", without further qualification, would afford a basis for excluding dredge workers. It would seem that the historic background of the term would have led one considering its meaning at that time to an exactly opposite conclusion. The rationale of these decisions was simply that a seaman is on board a vessel cooperating and contributing to the welfare of that vessel.

McRae v. Bowers Dredging Co., 86 Fed. 344, at 348.
("Their services were required in prosecution of the enterprise in which the vessels were employed.")

The Ocean Spray, 4 Sawyer, 105 (D. Oregon).
(". . . they are co-laborers in the leading purpose of the voyage".) (p. 111.)

Maryland Casualty Co. v. Lawson, 94 Fed. (2d), 190 (C. C. A. 5).

In *Norton vs. Warner Co.*, 321 U. S. 565, the Court stated at page 572:

> "Certainly members of the crew are not confined to those who can 'hand, reef and steer'. Judge Hough pointed out in *The Buena Ventura*, 243 F. 797, 799, that 'everyone is entitled to the privilege of a seaman, who, like seamen, at all times contribute to the labors about the operation and welfare of the ship when she is upon a voyage' . . .".

A dredge being an agency of navigation, those duties which necessarily contribute to her welfare and operation are duties in aid of navigation. The fact that, while dredg-

ing, some employees have duties which are similar to land employments is of no consequence. The duties of a cook, mess boy, and steward on an ocean liner are similar to land employments. The point is, however, that they are performed on a vessel and contribute to "the operation and welfare of the ship".[*3]

A second or subsidiary test is that the employees involved have what this Court has referred to as

> "that permanent attachment to the vessel which commonly characterizes a crew".[*4]

In *A. L. Mechling Barge Line, et al. vs. Bassett, et al.*, 119 Fed. (2d) 995, at 998 (C. C. A. 7), the Court remarked:

> "A reading of the cases makes it rather plain, that while numerous facts have been taken into consideration in distinguishing between a longshoreman and a member of the crew, the fundamental distinction generally recognized, has been whether the employee was permanently attached to a ship engaged in navigation".

It is submitted that the dredge personnel involved in the present case easily meet the requirements of both tests. In fact, the present case discloses a set of facts stronger than those found in most of the reported decisions.

The employees here involved take care of navigational lights and whistles. They handle the lines to the tow boats and to the scows. They move the scows in place alongside

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[*3] In *The Carson*, 104 Fed. (2d) 762 (C. C. A. 9), (Cert. den. *sub nom.* Union Dredging Co. v. Brashear, admr., 308 U. S. 591), the captain of a dredge engaged in deepening a channel in San Francisco harbor, was said to have duties which, in essence,

> "were no different from those of the captain of a merchant ship on a voyage at sea." (p. 764.)

[*4] *Norton v. Warner Co.*, 321 U. S. 565, at page 573.

the dredge and attend to their loading and unloading. They move the dredge from point to point while dredging and handle the spuds. They man the bilge, fire and circulating pumps and keep up steam for their operation. The operator alone handles the main engine during dredging operations. They chip, paint, scrape and clean the dredge, and, in general, keep it ship-shape.

The facts with respect to their permanency of attachment of the vessel have been described at pages 5-6 of the Petition. It is significant, however, that for many of them the dredge is their permanent home. The men on board these dredges are, it is submitted, seamen upon the basis of all the tests that have been judicially applied. It is because of this that the decisions have so uniformly reached the result that they are "seamen" within the legal meaning of that term.

It was this uniformity of result which led the Attorney General of the United States to state in the course of an opinion:

> "It may, therefore, be confidently asserted that, by the established rule of the Federal courts, all the persons regularly employed on a dredge to assist in its operation as a dredge are seamen and not 'laborers or mechanics'."[5]

B.

THE LEGISLATIVE HISTORY AND BACKGROUND OF SECTION 13 (A) (3) INDICATES THAT CONGRESS INTENDED DREDGE WORKERS TO BE INCLUDED WITHIN THE EXEMPTION.

We have seen that the enactment of the Fair Labor Standards Act came at a time when judicial precedent had

[5] 29 Op. A. G. 583 at 585.

unvaryingly included dredge workers within the term "seaman". This background gives added significance to the statement of Senator Black, now Associate Justice of this Court, when he remarked

> "I do not believe the bill, as written, covers the seamen, although there may be a question about it".[*6]

Senator Black was referring to S. 2475 which, at that time, contained no exemption with respect to seamen. Presumably the basis for the statement was the decision in *Ellis vs. United States*, 206 U. S. 246, involving the Eight Hour Day Act, which likewise contained no specific exemption for seamen. Moreover, in addressing the Senate after the Bill had been reported back with the present exemption included, Senator Black referred to "maritime workers" in discussing those persons excluded from coverage.[*7]

In the Committee Report accompanying S. 2475, it is stated

> "Legislative definitions and terms used in the act and the standards set out to guide the Board in the administration of the act clearly announce the congressional intent with respect to the legislation and preclude arbitrary action by the Board".[*8]

In the actual debate before both the House of Representatives and the Senate, no attempt was made to narrow the seaman exemption, whenever reference thereto was made.[*9]

[*6] Joint hearings before Senate Commission on Education and Labor and House Committee on Labor on S. 2475 and H. R. 7200, 75th Congress, 1st Session, p. 549.
[*7] 81 Cong. Rec. 7875.
[*8] Report from Committee on Labor to Accompany S. 2475—75th Cong. 1st Session, page 9.
[*9] 81 Cong. Rec. 7792.
83 Cong. Rec. 7280.

It seems curious, if Congress were intending that the word "seaman" should exclude dredge workers and thus contain a meaning which the term had never before held, that no reference thereto should have been made in debate. On the contrary, we find the Committee referring to the term used as "clearly" announcing the Congressional intent.

In the opinion of the Court below, statements of union representatives appearing before the Committee are quoted at some length. The Court then goes on to point out that these representatives were urging that

> "it would be unwise to have two boards with jurisdiction over the same group. This reason would apply to regular seamen and not to dredgemen, because the jurisdiction of the Maritime Commission did not extend over dredge-workers". (R. p. 29.)

It is not clear whether the Circuit Court concluded that only seamen subject to the jurisdiction of the Maritime Commission were intended to be within the exemption because, subsequently, the Court concludes that the term "seaman" was used

> "with its common meaning, referring solely to water transportation workers" (R. p. 29).

It is submitted that neither of these conclusions is supportable. It certainly can not have been the Congressional intent to cover only seamen subject to the jurisdiction of the Maritime Commission, for this would have included only seamen on approximately 148 subsidized vessels.*[10] It would specifically have not included employees on vessels engaged in coastwise or intracoastal trade or on the Great

*[10] Report of U. S. Maritime Commission to Congress for year ended October 25, 1938 at p. 9.

Lakes. (46 U. S. C. 1175-A.) Nor would it comprise employees on ferries, tow boats, barges and other similar types of craft. No argument seems necessary to demonstrate that this is clearly not the law, since even the Respondent Administrator in this case does not so contend.

The second conclusion that the term "seaman" was used with its "common meaning" referring solely to "water transportation workers" seems equally unsound.

(1) The quoted colloquies between the witness and Senator Black, Chairman of the Committee, did not refer to water transportation workers as such but to water transportation workers subject to the jurisdiction of the Maritime Commission. To refer solely to water transportation workers is to take the statement of the witness and reply of the Chairman out of its context. Accordingly, it must either be contended that Congress meant only water transportation workers subject to the jurisdiction of the Maritime Commission, which we have seen to be an unsound conclusion, or that the exemption was something much broader than can be discerned from the statement of witnesses and their exchanges with the Chairman of the Committee.

(2) Even if the intent was to include water transportation workers only, this would not, as the Court states, lead to the result that dredge employees are excluded. It has repeatedly been held that dredges are agencies of transportation."[11] Accordingly, the employees on dredges are water transportation workers.

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[11] *The Alabama*, 22 Fed. 449 (S. D. Ala.).
The Pioneer, 30 Fed. 206, 207 (E. D. N. Y.).
McMaster v. One Dredge, 95 Fed. 832 (D. Ore.).
City of Los Angeles v. United Dredging Co., 14 Fed. (2d) 364 (C. C. A. 9).
Butler v. Ellis, 45 Fed. (2d) 951 (C. C. A. 4).

In connection with this point, it is noteworthy that the Circuit Court of Appeals proceeded on the assumption that "scow or barge men are admitted to be seamen and have been so treated". Actually, this was an error on the part of the Court since the scowmen were not admitted by the Administrator to be seamen (R. p. 15). Presumably, the Court was proceeding upon the theory that scowmen are water transportation workers because scows transport the dredged material to the dumping ground or wherever it is to be placed (R. p. 27).

But it is clear that the dredge and its scows are one plant.

The Starbuck, 61 Fed. 502 (E. D. Pa.).

("That a dredge and her scows are to be treated as one concern and are subject to the admiralty jurisdiction has been several times decided and, I think, rightly".)

The Alabama, 22 Fed. 449, 451 (Circuit Court, S. D., Ala.).

In the latter case, the Court said, in part:

"It would be of no use to dig up the earth in the channel unless it should be transported away, and it could not be transported away unless it should be first dug out; and the whole business seems to be the transportation by water of earth and dirt from one place to another place . . . At all events, I am of the opinion that there can be no doubt about the scows being within the rule; and that there ought not to be any doubt about the dredge-boat. If they all constitute only one thing, then there can be no doubt, for the one thing and business was transportation by water craft". (pp. 450 & 451.)

It seems of some significance that the Circuit Court apparently felt that scow men were within the exemption despite the fact that they perform the same duties as the deckhands when not on the scow. This assumption, it is submitted, is correct. But, by a parity of reasoning, the dredge workers are likewise engaged upon an agency of navigation, and, if this be the test, should likewise be classified as seamen.

C.

THE TERM "MEMBER OF A CREW" AND ITS LIGHT ON THE CONGRESSIONAL INTENT.

A most significant element appearing on analysis of the legislative history, is the distinction which existed in 1938 between the term "member of a crew" and "seaman."

After the enactment of the Merchant Marine Act in 1920,*12 the Supreme Court in *International Stevedoring Co. vs. Havery*, 272 U. S. 50, held that longshoremen were seamen within the meaning of that Act. Congress thereafter enacted the Longshoremen's Compensation Act,*13 excluding from its provisions

> "a master or member of a crew of any vessel . . ."

Since it was clear that Congress was attempting to exempt from the provisions of the Longshoremen's Compensation Act a somewhat narrower class than were covered under the Merchant Marine Act, the courts concluded that the word "seaman" had a much broader connotation than the phrase "member of a crew of any vessel".

*12 41 Stat. 1007, 46 U. S. C. 688.
*13 44 Stat. 1424, 1426, 33 U. S. C. 901, 903.

In *Carumbo vs. Cape Cod Steamship Co.*, 123 Fed. 2nd, 991 (C. C. A. 1), the Court stated at page 994:

> "While courts have sometimes used the expressions 'seaman' and 'member of a crew' interchangeably (cases cited) it is well established that the word 'seaman' under the Jones Act does not mean the same thing as 'member of a crew' under the Longshoremen's Act. 'Seamen' is broad enough to cover both one who is a 'member of a crew' and one who is not a 'member of a crew'."

This distinction, it is submitted, sheds great light on the Congressional intent. Congress indicated that it knew how to circumscribe and delineate the class to whom the exemption extended, when that was its intent. It was well after the enactment of these two statutes and the distinction drawn between them that the Fair Labor Standards Act came on for passage. Yet Congress chose the word "seaman" and did not choose to avail itself of a phrase which had received a more restricted judicial interpretation."[14]

The Congress showed by its choice of language in the Longshoremen's Act that it knew how to restrict a class when it desired to do so. How then explain the deliberate choice of the broader term in the Fair Labor Standards Act if it was desired to exclude dredge personnel?

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*[14] It is noteworthy that when the Social Security Act, 42 U. S. C. 1004, 1101 (b) came on for enactment Congress chose the phrase "officer or member of a crew."

Remarking on this the Court in *Berwind-White Coal Mining Co. v. Rothensies*, 137 Fed. (2d) 60 (C. C. A. 3), stated at page 62:

> "Thus, in respect of a matter which had been in legislative controversy, Congress specifically observed the distinction between seamen on the one hand and longshoremen and casual workers on the other, just as the courts have done in construing the provision in the Longshoremen's and Harbor Workers' Compensation Act, excluding a 'master or member of a crew.'"

D.

The Benefits Enjoyed by Seamen Explains the Congressional Intent.

There is, indeed, a basis for concluding that Congress did not intend to include a class which had acquired a status giving it substantial benefits.

They have been able to maintain a seamen's libel for unpaid wages, damages or because of unseaworthy equipment causing them injury. The owner of the dredge may be held liable to the full value of the vessel and its freight for injuries sustained.*[15]

They have the right, as seamen, to bring suit under the Jones Act for damages or injury caused by negligence. They are entitled to the ancient admiralty right of maintenance and cure. In short, they have, as the Court remarked in *Kibadeaux v. Standard Dredging Co.* 81 Fed. (2d) 670 (C. C. A. 5), (cert. den. 299 U. S. 549) "rights cognizable in admiralty".

It is this difference in fact which has caused them to be treated differently in law. To hold now that they are not seamen would either result in jeopardizing the rights thus acquired, or, else would give them a privileged status not enjoyed by other seamen.

The decision of the Circuit Court of Appeals suggests that the test as to whether dredge workers are to be seamen or non-seamen will depend on whether or not the Court

*[15] The Carson, 104 Fed. (2d) 762, (C. C. A. 9). (Cert. den. *sub. nom* Union Dredging Co. v. Brashear, Admx., 308 U. S. 591.

concludes they are to be benefitted. This approach was well analyzed by the Court in *Lowrimoore v. Union Bag & Paper Corporation,* 30 Fed. Sup. 647 (S. D. Ga.):

> "It is thus manifest that flexibility may be employed to include as 'seamen' those who would not originally be considered as such. Can such flexibility be employed by making 'seamen' as generally understood, 'non-seamen?' Would it not be a fair test to conceive of a case where the complainants in this case were seeking to enforce their rights as seamen and would it then be held—especially in view of the fact that a seaman is a 'ward of the admiralty'—that these men were not seamen? That different remedies and even mutiple remedies may be provided for one who has a claim against another, whether the claimant be a seaman or otherwise, is recognized, but can a 'seaman' be made a 'non-seaman' or a 'non-seaman' a 'seaman' under the same facts unless there be varying definitions controlling the same, or unless there be coercive reasons to justify such contradictory interpretation of facts?" (p. 652.)

Point II.

Conflict of Jurisdiction.

The Circuit Court of Appeals in holding the Petitioner's dredge employees to be outside the exemption has applied a rule of law in conflict with prior constructions of the same exemption.

The case of *Gale vs. Union Bag & Paper Corporation,* 116 Fed. (2d) 27 held barge tenders to be seamen within

the meaning of the exemption as well as members of a crew. The employees there involved worked on so-called one-man barges which were non-self-propelled. They were furnished sleeping quarters for use while the barges were under tow but, at other times, appear generally not to have slept on the vessel. They were furnished no meals on board the barge.

In the present case, as appears from the Agreed Statement of Facts, the dredge employees of the Petitioner handled lines, tended the bilge pumps, took care of signals to and from passing vessels and the tow boat while the vessel was in tow as well as when dredging operations had actually commenced (R. pp. 12-15).

Thus, the deckhands under the supervision of the mate, handle lines, move the scows, handle the spuds, operate the deck engine to move the scows, scrub decks, oil equipment, do repair work, and shovel coal (R. pp. 13, 14-15). The oilers man bilge, fire and circulating pumps, as well as spud engines, deck engines and main engines (R. pp. 13 & 15). The mates are in charge of the deckhands, loading of scows, handling of lines and running lights (R. pp. 13, 14).

These duties, are, if anything, more nautical in their nature than those performed by the employees in the *Gale* case. But, in addition, the employees here involved had a permanency of attachment to the vessel (R. pp. 11 & 12) which is all but lacking in the *Gale* case.

It is submitted that the facts in the present case go beyond what appears in the *Gale* case in the direction of establishing the Petitioner's employees as seamen. Yet the result is directly opposed to that reached in the *Gale* case.

In fact, the Circuit Court of Appeals merely referred to the holding in the *Gale* case and then proceeded to cite the decision of the Circuit Court of Appeals for the Second Circuit in *Anderson vs. Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C. C. A. 2) as apparently representing a contradictory ruling. Presumably, the Court did not attach substantial weight to the *Gale* case upon the supposition that the *Anderson* case was in conflict.

Moreover, the decision in the present case is in conflict with the decision in *Walling, Adm. vs. W. D. Haden Co.*, now pending in the United States Circuit Court of Appeals for the Fifth Circuit for the Southern District of Texas, Galveston Division, No. 11302. This is, of course, not a conflict between the Circuits as such. Yet it was felt that the attention of this Court should be called to the *Haden* case, particularly in view of the fact that it followed and agreed with the reasoning in the case of *Bolan v. Bay State Dredging & Contracting Company*, 48 Fed. Sup. 266.

The cases of *Anderson vs. Manhattan Lighterage Corporation*, 148 F. (2d) 971 (C. C. A. 2) and *Walling, Adm. vs. Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9, (C. C. A. 7) are, of course, in accord with the present case so far as the actual decision is concerned, but the line of reasoning employed in each case indicates that a basic confusion exists between the Circuits.

In the *Anderson* case, barge employees were treated by the Court as being members of a crew and yet were held not to be seamen."[18]

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[18] This is the exact reverse of the statement in *Carumbo vs. Cape Cod Steamship Co.*, 123 Fed. (2d) 991, (C. C. A. 1) appearing at page 994:

"'Seamen' is broad enough to cover both one who is a 'member of a crew' and one who is not a 'member of a crew.'"

In the *Great Lakes Dredge & Dock Co.* case, the Court intimated that dredge employees were not seamen because they could not qualify as members of a crew.

It is submitted that there is confusion between the Circuits as to the proper interpretation of the exemption contained in Section 13 (a) (3) of the Fair Labor Standards Act, and that there is a basic confusion in reasoning regardless of results reached, so that an exercise of this Court's jurisdiction is necessary to correct and resolve that conflict.

Point III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS HOLDING THAT DREDGE EMPLOYEES ARE NOT SEAMEN AND THEREFORE NOT WITHIN THE EXEMPTION IS A DECISION OF A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

As pointed out earlier in this brief, there has been no decision by this Court construing Section 13 (a) (3) of the Fair Labor Standards Act. Yet this Court has decided that dredge workers are not laborers and mechanics but seamen. Hitherto, that holding had been followed by the courts in every case involving the issue.

The case of *Ellis vs. United States*, 206 U. S. 246, involved the applicability of the Eight Hour Day Law to dredge employees. The law specifically applied to "laborers and mechanics" employed on public works of the United States. It was held that these dredge employees were seamen and, therefore, were not "laborers and mechanics" within the meaning of the statute.

The Court stated, in part, at page 1054:

> "The words 'laborers and mechanics' are admitted not to apply to seamen as that name commonly is used. Therefore it was contended but faintly that the masters of the tugs could not be employed more than eight hours. But the argument does not stop with masters of tugs, or even with mates, engineers, and firemen of the case . . . (cases cited) . . . The scows and the floating dredges were vessels . . .. They were within the admiralty jurisdiction of the United States . . .. Therefore, all of the hands mentioned in the information were seamen within the definition in an earlier statute of the United States . . .. They all require something of the training and are liable to be called upon for more or less of the services required of an ordinary seaman. The reasons which exclude the latter from the statute apply, although perhaps in a less degree, to them. Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship . . .. As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn".

In the present case, the Circuit Court of Appeals remarked with respect to the *Ellis* case as follows:

> "It was not held that the term 'seamen' must include dredge-workers. It was only held that the latter were not laborers or mechanics within the meaning of that Act." (R. p. 32.)

It is submitted that this draws the line very fine indeed. The men were held not to be laborers or mechanics *because* they were seamen. It seems somewhat unrealistic and little more than an exercise in semantics to reach the result that this Court did not hold the men to be seamen.

The second point made by the Circuit Court with respect to the *Ellis* case is as follows:

> "The observation in the majority opinion that dredge-workers were seamen within the definition of an earlier statute (Rev. Stat. 4612, Sec. 713) must be read in connection with the limitation confining the definition to that statute, for the purpose of which 'seamen' would include persons who otherwise would be deemed not to be seamen". (R. p. 32.)

But there is no basis for concluding that dredge workers would otherwise be deemed not to be seamen. They had been held to be seamen in every decision prior to the *Ellis* case and the Court so noted. Moreover, the statute referred to is still in full force and effect.

Finally, the Circuit Court gives, as a reason for disregarding the *Ellis* case, the following:

> "Soon after that decision, Congress amended the statute so that it would apply to all persons performing 'services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor'. This was done for the stated purpose of overturning the *Ellis* decision". (R. p. 32.)

In the first place, the amendment referred to by the Circuit Court contained a proviso which is not referred to, reading as follows:

> "Provided that nothing in this Act shall apply or be considered to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavation machinery or tools. * * *"[17]

But more fundamentally, it is difficult to understand how a Congressional amendment enacted after the decision in the *Ellis* case, could affect the basic principles of that case. It is respectfully urged that the proper deduction from this action of Congress is the exact opposite of that reached by the Circuit Court of Appeals. By the decision in the *Ellis* case, Congress had learned that dredge employees were not laborers or mechanics but were seamen. By the amendment, Congress indicated that it knew how to cover at least some of these employees if it desired so to do. The failure to specifically cover them and the adoption of the broad term "seaman" in the Fair Labor Standards Act of 1938, therefore, appears to stand out with even greater significance.

It is respectfully submitted that the decision of this Court in the *Ellis* case was specifically disregarded by the Circuit Court of Appeals, and for reasons which, upon analysis, appear to be without justification.

Moreover, this Court in the case of *Norton v. Warner Co.*, 321 U. S. 565, in holding a bargee to be a member of a crew within the meaning of the Longshoremen's Compensation Act, after referring to such basic seamen's rights as maintenance and cure, the right to libel a vessel for unseaworthiness, the right to sue under the Jones Act, went on to say:

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[17] Act of March 3, 1913, Ch. 106, 37 Stat. 726, 40 U. S. C. 321.

> "Whether they are more desirable than a system of compensation is not for us to determine. But where Congress has provided that those basic rights shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise".

Those same basic rights are enjoyed by dredge employees. Further, this Court in *Norton v. Warner Co.* referred to the significance of permanency of attachment to the vessel. Both of these points were completely ignored by the Circuit Court of Appeals in its decision.

Finally, this Court in the *Norton* case, at page 572 remarked in a footnote:

> " 'Seamen' as used in a particular context may of course have a broader meaning than 'crew'. *International Stevedoring Co. vs. Haverty,* 272 U. S. 50. And see *Carumbo vs. Cape Cod Steamship Co.*, 123 F. (2d) 991."

It is submitted that the decision of the Circuit Court of Appeals for the First Circuit has decided a Federal question in a manner which fails to follow the applicable decisions of this Court.

Conclusion.

Proceeding upon the assumption that the common and usual meaning of the term "seaman" excludes dredge workers, the Circuit Court of Appeals has reached a result which is at variance with previous judicial precedents and constitutes, in reality, the establishment of a new principle of law.

The Court below stated that to hold dredge workers to be seamen would enlarge the scope of the term beyond its "usual boundaries" (R. p. 34). It is respectfully submitted that the decision of the Circuit Court has precisely the opposite result. It limits the meaning of the term far short of its usual boundaries. This result is not only inconsistent with previous judicial decisions but might well jeopardize established rights of dredge workers. The Circuit Court has failed to follow the true Congressional intent but has created a rule based upon what it believed would benefit the dredge workers. In so doing, it has failed to follow the decisions of this Court and has brought about a conflict with the result reached in *Gale vs. Union Bag & Paper Corporation*, 116 Fed. (2d), 27, (C. C. A. 5). The reasoning of the decision differs from that obtaining in *Walling vs. Great Lakes Dredge & Dock Co.*, 149 F. (2d) 9 (C. C. A. 7) and is likewise at variance with the reasoning to be found in *Anderson vs. Manhattan Lighterage Corporation*, 148 F. (2d) 971 (C. C. A. 2).

In view of the important question of federal law involved, the conflict and failure to follow applicable decisions, it is respectfully urged that the decision in this case requires an exercise of this Court's jurisdiction to review and correct by Writ of Certiorari.

It is, therefore, respectfully submitted that the Writ of Certiorari prayed for should be granted to the end that this action may be reviewed and determined by this Court; that the order of the Circuit Court of Appeals be reversed; and that your Petitioner be granted such other and further relief as may seem proper.

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